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No. 86-1972

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

NATIONAL FOOTBALL LEAGUE, et al.,
Petitioners,

VS.

OAKLAND RAIDERS, LTD., and LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Respondents.

MEMORANDUM OF RESPONDENT LOS ANGELES RAIDERS RE PETITIONERS' REPLY

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I. IMPROPRIETY OF AGAIN SEEKING CERTIORARI AFTER DENIAL OF CERTIORARI IN 1984

The petition contained nothing about either the Court's power to open up the 1984 decision of the court below or by way of justification for exercising any such power in this case. It is in its "Reply In Support of Petition for Certiorari" that NFL first tries to justify its procedure. Having had no opportunity to respond, we pray leave to do so now.

NFL relies on *Hamilton Shoe Co., v. Wolf Bros. & Co.,* 240 U.S. 251 (1916), *Hanover Shoe v. United Shoe Machinery Corp.,* 392 U.S. 481 (1968), and *Hughes Tool Co. v. Trans World Airlines,* 409 U.S. 363 (1973).[1] But there is a distinction wide and clear between the situation they address and the present. In each

[1] It cites other decisions in a footnote, but they add nothing.

of those cases the decision to which certiorari had been denied was not a *final* judgment but an *interlocutory* decision. For that reason, when a later final judgment came before the Court, it could search the record. Here the 1984 decision of the Court of Appeals to which certiorari was denied was a *final* judgment, affirming a final judgment of the district court on an appeal taken under F.R.Civ.P. Rule 54(b). This is shown at pages 3 to 5 of Raiders' brief in opposition to the petition (in No. 86-1972) and also at pages 3, 4, 7, and 8 of the petition for certiorari filed by Los Angeles Raiders in No. 86-1968. What led up to that final judgment was no longer reviewable after efforts to reverse it failed.

Hamilton Shoe was a suit for trademark infringement and unfair competition. On appeal from dismissal of the complaint the Court of Appeals held that the claimed trademark was invalid but remanded for an accounting on the claim of unfair competition. This, of course, was not a final decision. This Court denied certiorari. In the subsequent accounting trial, recovery of profits was denied, plaintiff appealed, the Court of Appeals reversed, and this Court granted certiorari and held that the trademark was valid and infringed. As respects its denial of certiorari at the earlier stage, the Court noted that what it had refused to hear at that time was *interlocutory*. The Court has power to review interlocutory decisions and does so when warranted, but failure to do so does not preclude review after a later final judgment (p. 258) because a review brings up everything not yet final.

In *Hanover Shoe*, the trial court had ruled as a matter of law that a defense in a price-fixing case that plaintiff had passed on the illegal overcharges to purchasers is not recognized, but it certified the issue to the Court of Appeals for an *interlocutory* appeal under 28 U.S.C. § 1292(b) (So stated and described, fn. 6, 392 U.S. at, p. 488). This Court denied certiorari to an affirmance. The issue was later presented to the Court of Appeals on appeal from the subsequent damage judgment entered after trial of the whole case, and certiorari was granted on petitions of all parties raising a variety of issues. The essence of the matter is that an appeal under 28 U.S.C. § 1292(b) is different from an appeal under F.R.Civ.P. Rule 54(b). An appeal under Rule

54(b) is from a *final* judgment. A 1292(b) appeal is an *interlocutory* appeal. In the words of the statute, such an appeal is allowed when decision of a question of law may "materially advance the ultimate termination of the litigation". A decision on a 1292(b) appeal is not a final adjudication of any issue but only an aid to the continuing conduct of the suit. It may control the inferior court under the doctrine of "law of the case", but until it enters into a later final judgment it is not *res judicata.*

As said in 16 Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure* (1977): Jurisdiction § 3921, p. 16:

> "Rule 54(b) is designed to implement and perfect application of the final judgment rule in complex litigation, in light of the basic policies of the final judgment rule. Section 1292, on the other hand, is designed for the quite different purpose of providing exceptions to the final judgment rule in light of special needs that override its basic policies."

In § 3929, the same authors state (at p. 146): "the fundamental purpose of § 1292(b) is to permit discretionary *avoidance of the final judgment requirement*". [Italics added.] The difference between a Rule 54(b) appeal and a 1292(b) appeal was stated in *Luckenbach Steamship Co. v. H. Muehlstein & Co.*, 280 F.2d 755 (2 Cir. 1960) by Judge Charles Clark (often referred to as the father of the Rules of Civil Procedure). Comparing Rule 54(b) and 28 U.S.C. § 1292(b) the court stated (p. 757):

> "Obviously the certification for an interlocutory appeal under 28 U.S.C. § 1292(b) is of a different tenor and serves a different purpose; it affords a means of selecting certain interlocutory orders for immediate appeal and does not, as does the rule, define the elements of finality which is the normal basis for appellate action."

In the *Hughes Tool* case, defendant Toolco defaulted, but before assessing damages the trial court certified a 1292(b) appeal on the question of the sufficiency of the complaint on which the default was based. The appellate court sustained the complaint and ordered the case to proceed to assessment of damages. This Court granted certiorari but then dismissed it in 1965 as improvidently granted. To the later final judgment for

damages, the Court granted certiorari. The feature distinguishing that case from this is that, as stated in footnote 1, at p. 365, "prior to its 1971 decision there had been no 'final judgment' with respect to the merits of TWA's cause of action against Toolco and therefore *res judicata* did not apply."

II. ON THE MERITS: PETITIONERS' LATEST BRIEF IS NOT A REPLY BUT AN EXPANSION OF ITS PETITION

Part II of petitioners' "Reply"[2] is not a reply at all but an expansion of its petition.

NFL's argument moves in two inconsistent directions. One is that there was no conspiracy at all under its theory that it and 28 separate clubs were a "single entity". To this end it cites *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). Yet it does not deny that *Copperweld* was restricted to a situation of a parent and its wholly owned subsidiary. What it argues is that *Copperweld* is one of a series of recent decisions from which, taken as a whole, can be extrapolated a broad revolution in antitrust law, whereby NFL should receive special treatment not yet to be found in any describable or announced rule.

NFL's major effort is an attempt to find a "conflict" with *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C.Cir. 1986) as respects ancillary concerted restraints. But there is no conflict, for *Rothery* held that the lawfulness of ancillary restraints is to be judged under the Rule of Reason and not on a *per se* basis, and the present case *was* decided under the Rule of Reason. As the facts of this case and those of *Rothery* are entirely different, a finding of reasonableness there is not the slightest basis for questioning the finding of unreasonableness here. To escape, NFL now argues (p. 5) that in an ancillary restraint case the law should not use the "same rule of reason review used to evaluate" other restraints but should test reasonableness in a different way. Thus, hereafter, there will be *per se* cases, Rule of Reason Category One cases and Rule of Reason Category Two cases; or, as Chairman Mao would put it, "let a

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[2] Part III is not directed to the Raiders.

1000 flowers bloom". In any event, this novel contention evaporates when laid alongside the facts. In *Rothery*, Atlas, a national van line, used agents; it had formerly permitted one to operate in competition with Atlas even by use of Atlas' equipment or "infrastructure" simultaneously with action as an agent (792 F.2d at 221). In response to this competition against it by its own agents, Atlas informed them that it would terminate an agency if the agent also competed unless it did so by means of a subsidiary operating under a different name and not using Atlas' name or facilities. It was the reasonableness of this mild refusal to use as an agent one who was a competitor that was involved. One basis of the court's finding this not to be an unreasonable restraint of trade was that Atlas had less than 6% of the van line business in the relevant market (p. 217, fn. 3) and therefore could not adversely affect competition (p. 229). In the present case NFL possessed and possesses 100% of the professional football business.

As for NFL's attempt (p. 6) to place the 1984 liability decision on procedural grounds it is enough to note that in NFL's 29 page petition for certiorari in 1984 (No. 84-406), it asserted no such contention, mentioned no "perceived procedural defects". An observation of Justice (later Chief Justice) Stone in *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 522 (1939) about "afterthought first emerging in this case after it was submitted . . ." is apropos, "like most afterthoughts in litigated matters it is without adequate support in the record".

CONCLUSION

We respectfully submit that the petition of the National Football League, et al. should be denied.

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